

Is it the Court's Role to Save a Country from Itself?

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On May 6, 2020, the Israeli Supreme Court [rejected](#) eight petitions against PM Netanyahu's rule as PM and against the [unity agreement](#) between Netanyahu and his former contender, Benny Gantz ("the Unity Agreement"). The unanimous decision was delivered by an expanded panel of eleven judges, who emphasized that despite the severity of the allegations against Netanyahu, there was no basis in Israeli law for disqualifying him.

The petitions raised two separate questions: first, whether a candidate who was indicted for corruption could be entrusted by the Knesset with the task of forming a government. The second, whether the Unity Agreement was illegal or unconstitutional, and whether it violated public policy.

Background and Facts

The decision was the apex a long political ordeal. On March 2, 2020, Israel held its third election within a year, after neither of the candidates for the office of prime minister was able to achieve the majority required for forming a government. A month earlier, on January 28, 2020, Netanyahu was [indicted](#) for three corruption allegation: bribery, fraud, and breach of trust. Shortly after the indictment, several petitions were filed to the Supreme Court, requesting it to rule that an indicted candidate could not serve as PM. The Court [rejected](#) the petitions, determining that they were premature, as such a scenario has not risen. Israelis thus went to the polls without knowing whether Netanyahu, should he be elected, will be eligible to serve as PM.

Following the elections, Gantz was able to secure enough support among MKs to become the first to receive from the President the mandate to form a government, as is prescribed by Israeli law. However, he failed to do so, and shortly upon the expiration of the mandate, on April 16, 2020, Gantz and Netanyahu entered a unity agreement to form a "National Emergency and Unity Government". The agreement was portrayed by both Netanyahu and Gantz as a necessity in light of the Covid-19 crisis.

The Unity Agreement establishes a two-head, "paritetic" government for the period of three years. It determines that Netanyahu will serve as PM for the first 18 months, during which Gantz will serve as an "Alternative PM", and that after 18 months, the two will alternate. The government will be based on two blocks, with each of the two parties allowed to invite other parties to join "its" block. The first six months (subject to extension) of the government were declared as an emergency period, during which all legislation not related to the coronavirus crisis was to be halted, as

were appointments of public officials. In addition, the agreement includes articles relating to respective membership of the two blocks in parliamentary committees, a mechanism allowing a party to replace an MK appointed to be a minister with a candidate from its own list, and a specific clause that determines that from the beginning of July on, and subject to the consent of the United States, Netanyahu could initiate [annexation](#) of parts of the West Bank.

The agreement required substantive constitutional and legislative changes. Basic Law: The Government was amended on May 7, 2020, a day after the Court's ruling was delivered, to establish the position of "Alternative PM" and entrench the central aspects of the Unitary Agreement. It also determines that Basic Law: The Knesset would be temporarily amended, so that the next elections will take place in three years, rather than in four. The Alternative Government Law (Legislation Amendment and Temporary Order), enacted the same day, includes several additional minor legislation changes needed to facilitate the Unity Agreement, as well as a clause that regards the eligibility of lists that split from larger parties to receive party funding.

The Legal Questions Before the Court

The Supreme Court hearings on Netanyahu's eligibility were the climax of an intense and long public debate. A few weeks earlier, Netanyahu's opponents slandered the Court after it intervened in the Knesset's speaker [refusal](#) to convene the Knesset for the purpose of electing a permanent speaker. On the other end of the political spectrum, photos of social-distanced demonstrations, the protestors standing two meters apart due to Covid-19 regulations, were circulated in the social media. All eyes were set on the Court, both metaphorically and literally: the proceedings were broadcasted online live, as part of a new pilot program, and received an impressive rating of a million views.

The burden imposed on the Court cannot be over-emphasized. Netanyahu's [supporters](#) declared that disqualification of Netanyahu would amount to illegitimate intervention in the people's will. His opponents looked up to the Court as the last resort, after disappointed from what they viewed as the [caving in of his opponents](#), including Gantz and Amir Peretz, who publicly vowed not to sit in a government headed by Netanyahu.

Well aware of the significance of the moment, Justice Hayut, the president of the Court, decided to hold the proceeding in an expanded panel of eleven judges. The Court carefully separated the different legal issues at stake: first, it stated that the topics that were under pending legislation would not be discussed, and will only be reviewed once the legislation is completed. An array of constitutional and legal questions was thus postponed to a later stage.

Several aspects of the Unity Agreement were amended during the intensive two-day hearings. The judges were discontent with the moratorium on appointments, and questioned its relevance to the coronavirus crisis. They also requested that the government present its agenda to the Knesset upon swearing, and suggested that several other changes be made, to which the respondents agreed. The decision

thus focuses on Netanyahu's eligibility, and the validity of the Unity Agreement as a whole.

The decision opens with the most contentious topic: Netanyahu's eligibility to serve as PM. Basic Law: The Government stipulates the conditions under which a convicted PM offence can be removed or should resign, but is silent on the status of an indicted PM. Thus, there is no explicit prohibition in Israeli law on the eligibility of an indicted candidate to establish a government and serve as PM. The Court thus examines whether such prohibition can be drawn from other sources. The central source, in this regard, was a past decision commonly referred to as the [*Deri-Pinhasi*](#) precedent, in which the Court determined that a PM is required to exercise his authority to fire ministers, and is obliged to fire indicted ministers. A similar ruling was delivered with respect to a commission of a local municipality's duty to remove an indicted head of municipality.

The Court rejected the applicability of these decisions. Framing the legal question around authority of the appointing body, the Court focused on the Knesset's entrustment of the task of forming a government. While the precedents involved the exercise of an authority that can be characterized, as least partially, as administrative, the decision to entrust a candidate with the task of forming a government was "distinctively political". Judicial review of such decision, the Court stated, was to be accordingly limited, and intervention was, in this case, unjustified.

With respect to the Unity Agreement, the Court rejected the petitions, stating that no basis for intervention was, at this point, found. It indicated, however, that several aspects were premature for intervention, but raise concern. In particular, the court expressed concern with respect to the prospect of diminishing representation of the opposition in parliamentary committees and in the committee for the election of judges, hinting that should this prospect materialize, it may trigger intervention.

Strikingly, the decision was unanimous. Due to the strict timeline imposed by the situation, only partial reasoning by President Hayut was published, and the decision states that other judges may specify their reasoning at a later date. While these separate opinions may include nuances, the ability to achieve a unanimous decision is notable, as it is rare in such expanded panels. The lack of dissent voices, among eleven judges, sends a strong message regarding the Court's institutional position.

Political Corruption and the Judicial Craft

The decision disappointed those who hoped the Court would block Netanyahu's continuing service as PM. In light of the long and ongoing attack on the Court by political actors, which constantly undermine the Court's legitimacy, one may ask whether, and to what extent, this affected the Court's decision.

Although it may be appealing to argue that the Court was deterred from blocking Netanyahu, this does not appear to be the case. Israeli law, which does state that a convicted PM must resign following a final verdict, simply does not prohibit an indicted candidate from being entrusted with the task of forming a government.

The distinction between the authority to appoint and remove from office ministers, and even the authority to remove from office heads of local municipalities, and the entrustment of the task of forming a government by the Knesset is, indeed, justified. The latter involves an explicit and direct act of the sovereign, and is, to a large extent, the epitome of the political act in the Israeli context. The choice to intervene in such act, in the lack of explicit constitutional grounds, would be unprecedented.

It should also be noted that the decision does not shy away from expressing discontent with the current political reality, and, more importantly, hints in more than one place that is not the final word. The decision is carefully crafted to pave the way for further review of the legal and constitutional changes enacted after the decision was delivered, as well as of other various issues that may come up down the road. Importantly, these may include any conflicts of interests that may arise from Netanyahu status as an accused, in particular with regard to decisions relating to law enforcement. The desire to maintain the possibility of judicial review of such issues is a possible answer to the question why the Court simply did not declare the issue to be non-justiciable.

The decision is an important case study on the relationship between corruption and democracy, and on the limits of courts in such context. Notably, both parties to the dispute claimed to have “democracy” on their side. Netanyahu’s attorneys claimed that court intervention, in what they argued was a clear expression of the people’s will, would subvert democracy. The petitioners argued that democracy was founded on the rule of law, which was [threatened](#) by Netanyahu’s continued rule. The court refused to choose between these two ethos of democracy, with Hayut stating during the hearings that “[no fort will fall](#)” should Netanyahu not be blocked.

The ability of Netanyahu to continue to serve as PM demonstrates that while corruption has many legal facets, public tolerance towards corruption is, first and foremost, a social issue. Courts are responsible for prosecuting corruption, but the severity of corruption allegations depends not only on the penalty attached to them, but also on their social denunciation by the citizenry. The ability of Courts to single-handedly change the public and political culture, with respect to corruption, is limited. It is perhaps most suitable to conclude with the words of Justice Amit, during the hearings, to the petitioners’ attorney: “My lord asks us to issue a permanent order making the world a better place. This is not among the remedies at our disposal”.

